IN THE HIGH COURT OF BOMBAY AT GOA
****

WRIT PETITION NO. 86 OF 1997

Dr. Vasudeo Rajendra
Deshprabhu, major in age,
agriculturist, r/o
Nanerwada, Pernem, Goa. ... Petitioner.

Versus

1. State of Goa, through the
Chief Secretary to the
Government of Goa, having
his office at Secretariat,
Panaji, Goa,

2. Mamlatdar of Pernem Taluka,
having his office at
Pernem, Goa, and

3. Shri Sheikh Hassan Sheikh
Moinuddin, major in age,
retired, r/o near Zori,
Nanerwada, Pernem, Goa. ... Respondents.

Shri V. B. Nadkarni, Senior Advocate with Shri Y. V. Nadkarni, advocate for the petitioner.

Shri H. R. Bharne, Government Advocate for respondent nos. 1 and 2.

None for respondent no.3.

CORAM : A. M. KHANWILKAR &
P. V. HARDAS, JJ.

DATE OF RESERVING THE JUDGMENT: 10th November, 2003.

DATE OF PRONOUNCING THE JUDGMENT: 16th December, 2003.

JUDGMENT (Per Khanwilkar, J.)

By this Writ Petition under Article 226 of the Constitution of India, the petitioner has challenged the constitutional validity of the Goa Mundkars (Protection From Eviction) (Amendment) Act 1993, (Goa Act no.6 of 1995) (31.3.1995) (hereinafter referred to as "the Amendment Act of 1993") and the Goa Mundkars (Protection From Eviction)

(Amendment) Act, 1995, (Goa Act No. 2 of 1996) (19.1.1996) (hereinafter referred to as "the Amendment Act of 1995"), on the ground that the said Amendment Acts are ultra vires the petitioner's fundamental rights enshrined under Article 14 read with Article 13(2) of the Constitution of India. Inasmuch as, the mundkar is entitled to indefinitely wait for any number of years and yet exercise his right to purchase the dwelling house at the pegged down price and area freezed as on 12th March, 1976, which results in absurd, incongruous, unreasonable, unjust, arbitrary and discriminatory situation.

2. Briefly stated the petitioner has approached this Court asserting that the petitioner has over a dozen cases of mundkar pending before the Court of the learned Mamlatdar or Joint Mamlatdar in Pernem. Respondent no.3 is allegedly claiming to be mundkar of a dwelling house in the petitioner's property bearing survey no.485/6 of Pernem Taluka. To provide for better protection to mundkars against eviction from their dwelling houses, for granting them right to purchase the same and to make certain other provisions related thereto, the Goa, Daman and Diu Mundkars (Protection From Eviction) Act 1975 (Act no.1 of 1976) (hereinafter referred to as "the Principal Act"), was enacted, which came into force with effect from 12th March, 1976, which is the appointed date. The historical background and the objects and reasons for which this enactment came into being as well as the scheme of the relevant provisions thereof, has already

been expounded by this Court in 1998(1) Goa L.T. 100 in the case of **Kum. Maria Eliza Marques vs. Shri Madhukar M. Moraskar & Ors.,** and in 2001(1) Goa L.T. 213, **Aggrieved Bhatkars' Association & Ors. vs. State of Goa & Ors.** It is not necessary for us to dwell upon the entire scheme of the enactment. Suffice it to mention that Section 15 of the Act provides for right of mundkar to purchase the dwelling house and Section 16 provides for procedure for purchase under Section 15. Section 15 "as it appeared in the Principal Act", reads thus:-

> "15. **Right of mundkar to purchase the dwelling house. -** (1) Notwithstanding anything to the contrary contained in any law for the time being in force, a mundkar shall, subject to the provisions of this Act have the right to purchase the dwelling house occupied by him.
>
> (2) The maximum extent of land round or appurtenant to the dwelling house which a mundkar is entitled to purchase under this section shall be as indicated under sub-clause (i) of clause (i) of section 2.
>
> (3) The purchase price payable by the mundkar for his dwelling house shall be the market value of the dwelling house purchased and the improvement thereon, other than the improvement, if any, belonging to the mundkar:
>
> Provided that, when the house, hut or any structure with its materials belong, wholly or partly, to the mundkar, the corresponding value shall be deducted from the market value and, in such case, the purchase shall be the balance left after deducting the corresponding value from the market value:
>
> Provided further that when a mundkar has been permitted to occupy the dwelling house by the bhatkar for the purpose of cultivation of or for the purpose of watching and protecting, an agricultural land of the bhatkar and is

> actually rendering such service and continues to render such service with or without remuneration or where a mundkar is an agricultural labourer or a village artisan, then the purchase price payable by such mundkar and a member of his family shall be twenty per cent of the market value payable.
>
> (4) The purchase price payable under sub-section (3) in respect of the dwelling house shall be paid in not more than ten equal annual instalments:
>
> Provided that, it shall be open to the mundkar to pay the entire purchase price in lumpsum, in which case, the amount payable shall be only ninety per cent of the purchase price.
>
> (5) The market value of the dwelling house, shall be decided by the Mamlatdar, after making such inquiry as he deems necessary and in the prescribed manner."

This provision was amended in the year 1979. We are not concerned with the said amended provision in this petition. Thereafter, the Governor of Goa in exercise of powers under Clause (1) of Article 213 of the Constitution of India, promulgated the Ordinance known as Goa Mundkars (Protection From Eviction) (Amendment) Ordinance, 1993, on 19th April, 1993, which attempted to amend Section 15 of the Principal Act. By passage of time, that Ordinance lapsed. Subsequently, the Bill was introduced in the Legislative Assembly of Goa, being Bill No.25 of 1993 on 26th June, 1993, to amend Section 15 of the Principal Act. However, the Bill was returned to the Assembly for reconsideration by the Governor in accordance with the powers vested in him under Article 200 of the Constitution of India. Thereafter another Bill was passed by the Goa Legislative Assembly, which was translated into the Amendment Act of 1993. That Bill was

passed on 28th March, 1995, which received assent of the Governor on 31st March, 1995 and came to be published on the same day. The Act clearly provides that the Amendment therein would come into force with effect from 16th April, 1993. This Amendment Act of 1993 has amended Sub-section (3) of Section 15 of the Principal Act by insertion of the words "as prevailing on the appointed day", after the words "dwelling house purchased" and before the words "and the improvement thereon". The effect of this amendment is that the mundkar is entitled to purchase the dwelling house at the price as prevailing on the appointed date, i.e. 12th March, 1976. This amendment has been challenged by way of the present petition being hit by Article 14 read with Article 13(2) of the Constitution of India. After the amendment, Sub-section (3) of Section 15 would read thus:-

> "15(3) the purchase price payable by the mundkar for his dwelling house shall be the market value of the dwelling house purchased 'as prevailing on the appointed date' and the improvement thereon, other than the improvement, if any, belonging to the mundkar."

The object and reasons for the said Amendment of 1993 as reproduced in paragraph 26 of the Writ Petition read thus:-

> "26. In the introduction of the Bill, the statement of Objects and Reasons given are as under:--
>
> 'It has been noticed that some of the Mamlatdars/Joint Mamlatdars, while determining the purchase price payable by Mundkars for dwelling house, had taken into consideration the basis of the market value prevailing in

> the vicinity of the locality at the time of fixing the said price. The aforesaid approach did not appear to be on sound footing since the appointed date when the Goa, Daman & Diu (Protection From Eviction) Act, 1975 came into force was 12-3-1976 and the right of the Mundkars to purchase dwelling house came into existence on that date and hence the purchase price had to be as on the appointed date i.e. 12-3-1976 and consequently the market value thereof is required to be determined as prevailing on that date.
>
> In order to obviate the aforesaid difficulties faced by the Mundkars, the Goa Mundkars (Protection From Eviction) (Amendment) Ordinance, 1993 (Ordinance no.1 of 1993) has been promulgated by the Governor of Goa on 16-4-1993".

The State Legislature passed another Bill to amend Section 2(i) of the Principal Act which defines "dwelling house". This Bill no.27/95 was passed on 14th December, 1995 by the Goa Legislative Assembly, which is known as Amendment Act of 1995. The said Act was assented to by the Governor on 19th January, 1996 and published in the Official Gazette on 29th January, 1996, which was to come into force with effect from 27th September, 1995. This Amendment Act of 1995 brought about two amendments to item (i) of Clause (i) of Section 2 of the Principal Act, namely, in the said item (a) after the expression "if the land is" and before the expression "within the jurisdiction", the words, "on the appointed date" shall be inserted; and in the first proviso to the said item (b), after the word "where" and before the expression "the dwelling house", the words "on the appointed date", shall be inserted. The definition of "dwelling house", "as it appeared in Section 2(i) of the Principal Act" reads thus:-

"(i) 'dwelling house' means the house in which mundkar resides with a fixed habitation, whether such house was constructed by the mundkar at his own expense or at the bhatkar's expense or with financial assistance from the bhatkar and includes -

(i) (a) the land on which the dwelling house is standing and the land around and appurtenant to such dwelling house, subject to a maximum limit of five metres, if the land is within the jurisdiction of a village Panchayat, and two metres, if it is not within such jurisdiction, from the outer walls of the dwelling house:

Provided that, where the distance between the outer walls of the dwelling house of the mundkar and of the house of the bhatkar, or between the outer walls of the dwelling house of a mundkar and of the dwelling house or houses of one or more mundkars, is less than double the aforesaid limit the land appurtenant to such dwelling house shall be half of the land lying between the outer walls of the dwelling house of such mundkar and the bhatkar or between the outer walls of the dwelling house of such mundkar and the outer walls of the dwelling house or houses of such other mundkar or mundkars, as the case may be; or

(b) three hundred square metres of land including the land on which the dwelling house is standing:

Provided that where the dwelling house is within the jurisdiction of a municipal council the dwelling house shall include two hundred square metres of land including the land on which the dwelling house is standing:

Provided further that where there is on the appointed date in the property of the bhatkar, the house of the bhatkar or a dwelling house of one or more than one mundkar, and the total extent of the land is inadequate to provide each of them the extent indicated in this clause, the dwelling house shall include, in the absence of any agreement, the land apportioned in equal shares, as far as practicable, by the Mamlatdar.

Explanation I. - The option contemplated

> under this clause shall be exercised by the Mundkar in the manner prescribed.
>
> **Explanation II.** - For the purpose of this clause 'house' means an entity in itself and shall not include a Dharmashala or such other building belonging to or in possession of a religious or charitable institution and issued for temporary accommodation and such other building as may be meant for letting out on hire and a portion of which has been let out.
>
> (ii) the cattle shed, stable, pig-sty, workshop or such other structure connected with the business or profession of the mundkar; and
>
> (iii) the customary easement, if any, which the residents of the dwelling house have been enjoying for access to a public road or a well or any other place;". (Emphasis supplied)

There was an amendment in 1985, whereby the expression "whether such house was constructed by the mundkar at his own expense or at the bhatkar's expense or with the financial assistance from the bhatkar" (as emphasized above) came to be deleted. We are not concerned with that aspect in the present petition. The validity of the Amendment Act of 1985 was put in issue in the case of **Maria Eliza Marques** (supra). We are not concerned with the said challenge. Be that as it may, after the subject Amendment Act of 1995, the definition of "dwelling house" has undergone substantive change inasmuch as irrespective of the length of time when the mundkar will exercise his right to purchase the dwelling house, by virtue of right bestowed on him under Section 15 of the Act, the area of dwelling house which he could so purchase has been freezed as on the appointed date, i.e. 12th March, 1976. According to the petitioner, even this amendment is hit by Article 14 read with Article 13(2) of the Constitution of

India.

3. The points which were canvassed before us during the course of arguments were restricted to challenge of the Amendment Acts of 1993 and 1995, respectively, only on the ground that both the amendments were hit by Article 14 read with Article 13(2) of the Constitution of India. This argument proceeded on the premiss that the said Amendment Acts have neither been included in the Ninth Schedule of the Constitution of India, nor received the assent of the President of India, for which reason it will have no protection under Articles 31A, 31B or 31C of the Constitution of India and on account of which challenge to the said Amendment Acts on the ground that it infringes Article 14 of the Constitution of India, was open. Insofar as the grounds of challenge to question the constitutional validity on the touchstone of Article 14 of the above said provisions introduced by the Amendment Acts of 1993 and 1995 respectively, it was submitted as follows:-

(a) The Principal Act neither provides for deemed vesting of ownership rights in a mundkar on the appointed date, as is the case under the Goa Agriculture Tenancy Act, nor mandates or provides for any time limit for exercise of option under Section 16 of the Act for purchase of the rights under Section 15 of the Act, nor there is any provision for the consequences to follow in case of exercise of right to purchase even after a reasonable period.

(b) The impugned Amendment Acts were arbitrary and/or unreasonable, since

irrespective of the date of exercise of right to purchase by the mundkar, the price payable to the bhatkar is only the market price as on the appointed date (i.e. 12th March, 1976), thereby resulting in hostile discrimination and/or equality of unequals;

(c) The amendment Act of 1995 freezes the area of the dwelling house as on the appointed date, which aspect has already been held by this Court to be absurd and unjust in the case of **Fatima D'Souza & Anr. vs. Joint Mamlatdar II of Salcete & Ors.**, reported in 1989(1) Goa L.T. 67. It was contended that there is no indication in the Amendment Act of 1995 that the same was introduced to undo the decision of this Court in **Fatima D'Souza's** case (supra) and, therefore, the efficacy of that decision could not have been whittled down in this manner;

(d) Besides the challenge to the impugned Acts being hit by Article 14 of the Constitution, it is also contended that the rights of the bhatkars are extinguished in violation of Article 300A of the Constitution as no compensation at all is being paid to the bhatkars as there is no compulsion on the mundkars to purchase the land in respect of which the rights of the bhatkars are extinguished;

(e) It is also contended that eventhough the impugned Acts have no protection under Article 31A of the Constitution, the principle underlying the said provisions in particular, as embodied in the second proviso to clause (1) thereof ought to prevail; that eventhough it is an enactment for furtherance of agrarian reforms, even then provision for payment of compensation at a rate which shall not be less than the market value is an imperative.

4. On the other hand, Shri Bharne for the respondents, contends that the Principal Act has been held to be a piece of legislation relating to agrarian reforms and inserted in the Ninth Schedule to the Constitution of India.

He submits that having regard to the laudable objects of the Act the challenge to the provisions of such enactment will have to be viewed in that perspective. Shri Bharne fairly submits that from the record it is not possible to establish that the Amendment Acts of 1993 and 1995 have received presidential assent or that they have been included in the Ninth Schedule of the Constitution. He submits that in any event, the argument regarding the Amendment Acts being ultravires Article 14, is not available to the petitioner. According to him that issue is already concluded as a Division Bench of this Court in the case of **Aggrieved Bhatkars Association** (supra) has held the Amendment Acts to be intravires the Constitution. He submits that in view of the exposition in the case of **Minoo Framroze Balsara vs. the Union of India & Ors.,** AIR 1992 Bom. 375, specially paragraph 14, it is not open for this Court to go into the question of validity of the same enactments merely because some new ground is pressed into service. Shri Bharne further contends that the issue as to whether the State is bound to pay compensation in cases of deprivation of property under law made under Article 300 A is also no more res integra. According to him, the related question is what is the criteria for determination of quantum of compensation and whether the market value of the property acquired by the State is to be paid. Shri Bharne has placed reliance on the decision of our High Court in the case of **Basantibai Fakirchand Khetan & Ors. vs. State of Maharashtra & Anr.,**

reported in AIR 1984 Bom. 366, wherein the provisions of the Maharashtra Housing and Area Development Act, 1976, were challenged, providing for compensation being hit by Article 300 A, notwithstanding the repeal of Articles 19(1)(f) and 31(2) of the Constitution of India. He submits that this decision was reversed by the Apex Court in the case of **State of Maharashtra & Anr. vs. Basantibai Mohanlal Khetan & Ors.,** reported in AIR 1986 S.C. 1466. He has also placed reliance on the decision of the Full Bench of the Kerala High Court in the case of **Smt. Elizabeth Samuel Aaron & Ors. vs. State of Kerala & Ors.,** reported in AIR 1991 Ker. 162, to contend that the argument that right to adequate compensation remains the basis of Article 300 A of the Constitution, has been negatived. The learned counsel has also placed reliance on the decision of the Apex Court in the case of **Jilubhai Nanbhai Khachar etc. vs. State of Gujarat & Anr.,** reported in AIR 1995 S.C. 142, to contend that whilst interpreting Article 300 A of the Constitution of India the Apex Court repelled the challenge to the constitutionality of the Bombay Land Revenue Code and Land Tenure Abolition Laws (Gujarat Amendment) Act, 1982. He has placed reliance on the observation in the said decision which deal with the argument that considerable time kept for payment and loss of rupee value would render the compensation payable illusory. That contention was negatived by the Apex Court and on the same analogy the grievance of the petitioner in this petition will have to be rejected. Shri Bharne contends that different

Acts may provide different principles relating to the payment of compensation and in the context of the object of extinguishing rights of bhatkars in the present enactment, challenge under Article 14 of the Constitution cannot be countenanced, even if the purchase price provided in Section 15(3) may not correspond to fair value or market value. Learned counsel placed extensive reliance on the decision of this Court in the case of **Kum. Maria Eliza Marques vs. Madhukar M. Moraskar & Ors.**, (supra), which elaborately deals with the history and objective behind the enactment of the Principal Act; as well as the decision reported in the case of **Aggrieved Bhatkars' Association** (supra), to contend that the challenge to the validity of the Amendment Acts was not open as that has already been negatived in this Judgment. Learned counsel has also placed reliance on the decision of the Apex Court in the case of **D. C. Bhatia & Ors. vs. Union of India & Anr.**, reported in (1995)1 S.C.C. 104, to contend that the Court cannot consider whether the cut off point provided by legislation has been done on an understandable basis and the validity of the provisions cannot be questioned on the ground of lack of legislative wisdom. He submits that classification need not be with mathematical exactitude as the Legislature ought to be given considerable latitude for making classification having regard to the surrounding circumstances and facts, moreover when it is well-settled that there is always a presumption as to the constitutionality of the legislation. According to him, the

petitioner has not discharged the burden of demonstrating the impugned Amendment Acts as being unconstitutional in any manner.

5. As mentioned earlier, the record clearly establishes that the assertion made by the petitioner that both the Amendment Acts are neither included in the Ninth Schedule to the Constitution, nor have received the assent of the President of India has remained uncontroverted. In our view that position is indisputable. As a consequence, the Amendment Acts will not receive protection provided for either under Article 31A, Article 31B or Article 31C of the Constitution of India. It is well-settled that mere inclusion of the Principal Act in the Ninth Schedule does not automatically result in extending the protection of Article 31B of the Constitution, on the ground that the amendments were ancillary or incidental to the principal provision. Whereas, inclusion of even the Amendment Acts in the Ninth Schedule to the Constitution, which are passed after the Principal Act was inserted in the Ninth Schedule to the Constitution, is an imperative. (See AIR 1975 S.C. 1193 **The Godavari Sugar Mills Ltd. vs. S. B. Kamble & Ors.** paragraphs 14, 15 and 16). It is also well-settled that for any Amendment Act to receive protection either of Article 31A or 31C of the Constitution assent of the President of India is quintessence (See AIR 1971 S.C. 1192 **Sriram Narayan Madhi vs. The State of Maharashtra,** paragraph 11). As a necessary

corollary, it will be open to the petitioner to challenge the validity of both the Amendment Acts on the ground of being hit by Article 14 read with Article 13(2) of the Constitution of India.

6. We shall now deal with the principal objection taken on behalf of the respondents regarding the tenability of the challenge to the validity of the Amending Acts being hit by Article 14 of the Constitution of India, on the ground that the said Amendment Acts have already been held intravires the Constitution by the Division Bench of this Court in the case of **Aggrieved Bhatkars' Association** (supra). The question is whether the challenge to the Amendment Acts on the ground of Article 14 was categorically put in issue and has been so answered in the case of **Aggrieved Bhatkars' Association** (supra)? If the answer is in the negative only then, it will be open for this Court to examine the matter any further. To examine this aspect we have meticulously read and re-read the decision in **Aggrieved Bhatkars' Association** (supra). Our understanding of the matter is that neither the issue of the Amendment Acts being hit by Article 14 of the Constitution of India was specifically raised, nor has been categorically answered in the said decision. In fact, on close examination of the judgment it is seen that so far as the challenge to the definition of "dwelling house", which is referable to the Amendment Act of 1995, the same was not pressed at all as can be discerned from the observation

in paragraph 10 of this judgment. The only argument with regard to the validity of the Amendment Act of 1993 if at all, can be culled out from the challenge of the petitioners therein as articulated in this decision at paragraph 3. Insofar as fixation of the price on the appointed date, by the Amendment Act of 1995, the same was put in issue only on two aspects. We think it apposite to reproduce as to how the Division Bench in the case of **Aggrieved Bhatkars' Association** understood the submissions of the petitioners therein. The same reads thus:-

> "3. Though in the main petition various provisions of the Mundkar Act have been challenged in various backgrounds and different contexts, Mr. Usgaokar, the senior advocate appearing for the petitioners, restricted his arguments and challenge to only three aspects of the matter, which he gave us as brief propositions, they are as below:-
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> 1. The fixation of the price as on the appointed date (12.3.1996) by Amendment Act 6 of 1995 dated 31st March, 1995 is invalid because:-
>
> (a) There is acquisition of estate by the State and transfer in favour of beneficiary (Article 31A (a)) in which case the compensation is to be paid as per the market value, when the land is in personal cultivation of the owner, as per 2nd proviso to Article 31A, which creates fundamental right.
>
> (b) There is lack of Presidential assent as per 1st proviso to Article 31A which makes the legislation unenforceable.
>
> 2. Conferment of right to all mundkars in respect of land falling in the Municipal area is not a part of Agrarian Reform. Hence,

not covered by Article 31A of the Constitution.

3(a). Section (p) of the Mundkar Act creates two classes, namely, the first class where no services were rendered to bhatkars by the mundkars and who are not connected with agriculture and the second class falls outside the agrarian Reform. But the definition of Section 2(p) of the Mundkar Act is giving benefit to both the classes together and this amounts to unequals being treated as equals thereby infringing Article 14 of the Constitution.

3(b) The inclusion of the Mundkar Act in the IXTH Schedule of the Constitution is not an obstacle to challenge the same, not only because the Act is subsequent to 23rd April, 1974 (Keshavanand Bhareati's case) but also because it is prior to deletion of Clause (f) of Article 19 on 27th June, 1979.

3(c) Since the same legislation included the second category as stated above in 3(a), it offends the basic structure as contained in Articles 13A (a), 14 and 19 read with 13 (2)."

On plain reading of aforesaid challenges as articulated in paragraph 3 reproduced above, there was absolutely no challenge to the Amendment Act of 1993 on the touchstone of Article 14, as such. Indeed Mr. Bharne placed reliance on paragraphs 3, 8, 11, 13, 15, 16, 21, 24, 29, 30, 32, 35 and 37 of the decision in the case of **Aggrieved Bhatkars' Association** case (supra). However, as mentioned earlier, even on close reading of the said paragraphs, or for that matter on fair reading of the judgment as a whole, we are unable to accept the argument that the constitutional validity of the Amendment Act of 1995 was challenged at all and, in case of Amendment Act of 1993 on the touchstone of Article 14. On the other hand, in our view, paragraph 8 deals with the historical background to the Principal Act and

extensively adverts to paragraph 3 of the decision in the case of **Maria Eliza Marques** (supra). Whereas paragraphs 11 to 22 only deal with the first challenge regarding the definition of "mundkar". That is not in issue in the present case, for it is neither referable to the impugned Amendment Act of 1993 or 1995. The second challenge considered in paragraphs 23 to 25 is again on the basis of Section 2(p) of the Principal Act which defines "mundkar", that it creates two classes not connected with agriculture and for which reason it is hit by Article 14. That is also not in issue in the present case, nor related to either of the impugned Amendment Acts. The next argument considered in paragraphs 26 to 31 relates to the question of compensation as per market value to be given in terms of the second proviso to Article 31A. Although that contention has been raised in the present Writ Petition, we are not going into that issue at all, but confining ourselves to the challenge on the ground that the Amendment Acts are hit by Article 14 of the Constitution. At the cost of repetition, the validity of the impugned Amendment Acts on the touchstone of Article 14 of the Constitution of India was not put in issue, nor has been categorically decided in the case of **Aggrieved Bhatkars' Association** (supra). It is, however, relevant to advert to paragraph 29 of the same decision wherein the Court has accepted the argument of the Advocate General appearing for the State, that the Principal Act is not an Act providing for acquisition, whereas it is an entirely different enactment –

as there is no compulsory purchase by the mundkars, nor there is extinguishment of rights of the bhatkars. Moreover, there is no deeming provision making the mundkars as owners.

7. Even in the present petition, the argument canvassed on behalf of the respondents is on the same lines; And we have no hesitation in accepting the argument of the respondent State that the Principal Act is a sui generis legislation. In our view, the Principal Act is neither an enactment to provide for acquisition by the State of the property of the bhatkars, or providing for extinguishment of rights of bhatkars and transfer of ownership of the estate in favour of mundkars on the coming into force of the Act as such. Whereas, the Act only ignites a right in favour of mundkar to purchase the dwelling house as per the manner provided under the Act. There is no provision in the Act whereby the mundkar becomes deemed owner as is the case in cognate legislation such as the Goa Agricultural Tenancy Act, 1964, nor there is any provision obligating the mundkar to purchase the estate from the bhatkar muchless in prescribed time. In other words, it is only an Act enabling the mundkar to purchase the dwelling house if he so desires, on complying with the other requirements or formalities. So long as the mundkar has not exercised his right to purchase the dwelling house, the relationship of the parties is not snapped. For bhatkars remain to be the owners of their estate and the provisions such as Sections 9 which provides for transfer of

property by bhatkar and Section 12 providing for the ground on which a mundkar can be evicted from the dwelling house are clearly pointer in that behalf. Indeed, till the mundkar purchases the property by exercising his right under Section 15 read with section 16 of the Act, only till such time, the bhatkar is entitled to own and enjoy the property in the restricted manner as provided by the Act. A priori, the legislation has not and does not extinguish the right of the bhatkar on the coming into force of the Act as such, till the mundkar opts to exercise his right to purchase under Section 15 read with Section 16 of the Act. If the mundkar has no intention to purchase the property, the provisions of the Act would govern the field and regulate the affairs between the mundkar and bhatkar.

8. Reverting to the decision in **Aggrieved Bhatkars' Association** case (supra), in paragraph 30 of the same decision, the Court has held that the Mundkar Act is not a provision for acquisition by the State of the estate of the bhatkars either directly or indirectly, or by implication, whereas the Act only aims at putting restraint on the rights of the bhatkars to oust mundkars, save and except in the manner provided in the Principal Act. In paragraph 31 the Court has accepted the argument of the Advocate General for the State that Article 31A of the Constitution of India does not create a fundamental right and that Article can be used only when there is challenge to the acquisition laws and it

is a provision for saving of laws. Indeed in paragraph 32 the Court has observed that the petitioners have also challenged the amendments to Section 15(3) of the Principal Act brought into force by the Amendment Act of 1995, on the ground that Section 15(3) creates a class without any rationale basis and is hit by Articles 14, 16 or 31A. However, on a careful reading of the said paragraph it is seen that the Court has not tested the validity of the Amendment Act of 1995 as is put in issue in the present petition, but examined the contention only in the context of the proviso inserted in Section 15(3) by the Amendment Act of 1979. The Court then went on to examine the challenge to the said proviso by extracting the proviso in the same paragraph and ultimately found in paragraph 35 that the proviso as introduced by the Amendment Act of 1979, is not violative of Article 14 or Article 16 of the Constitution. Once again, there is no indication anywhere that the Court examined the validity of the Amendment Act of 1993 or 1995, which is questioned in the present petition that too being hit by Article 14 of the Constitution of India. The above challenge has been examined in paragraphs 32 to 38 of the judgment. In paragraphs 39 and 40, the Court considered the next argument that inspite of the inclusion of the Principal Act in the Ninth Schedule of the Constitution, the validity of the Act can be challenged because it was so included after Keshavananda Bhareati's case and before deletion of Article 19(1)(f) of the Constitution of India. That contention has

been rejected on the ground that the Act was saved by Article 31C of the Constitution of India.

9. From the above, it is plainly clear that in the decision in the case of **Maria Eliza Marques** (supra), this Court was called upon to examine the validity of the Amendment Act of 1985, which Act was protected by Article 31A of the Constitution, having received Presidential assent. Similarly, in the decision in **Aggrieved Bhatkars' Association** (supra) the challenge to the Amendment Act of 1995 has been given up as mentioned in paragraph 10 of the said decision, which means that there was no challenge to the Amendment Act of 1995 at all, which is put in issue in the present matter. Insofar as the Amendment Act of 1993 is concerned, there was no challenge on the ground that it was hit by Article 14 and, in any case, on a fair reading of the judgment as a whole, it is not possible to accept the argument that the validity of the said Amendment Act of 1993 was put in issue or the Court has categorically negatived the challenge thereto. Whereas, the argument examined therein is with reference to the Amendment Act of 1979, being hit by Articles 14 and 16.

10. On the above reasoning the argument of the respondents that it is not open for this Court to consider the challenge regarding validity of the said Amendment Acts of 1993 and 1995, cannot be countenanced. Understood thus, the judgment in the case of **Minoo Balsara** (supra) on which

strong reliance was placed by the respondents, will be of no avail to the respondents.

11. We shall now examine the argument whether provisions of the Amendment Acts are hit by Article 14 of the Constitution of India. The argument advanced on behalf of the petitioner is that the provision inserted by the Amendment Acts if applied to same class of persons, the effect is different. In other words, it is contended that equals are being treated unequally. It is also argued that the said amendments are an attempt to peg down the market price and area; and since there is no compulsion on the mundkar to purchase the property, much less in a specified or reasonable period, the application of that provision would give absurd and discriminatory effects. We find substance in this argument. We are not even for a moment suggesting that the enactment suffers from lack of legislative wisdom. However, on careful examination of the said provision and in particular the possible effects of application of the said provision to the same class of persons, we find that the effects and/or results are different. If that is so, it is a clear case of hostile discrimination. To illustrate the outcome of application of the amended provisions to the same class of persons on account of providing for pegging down the purchase price as on the appointed date, or the area of the dwelling house as on the appointed date, we would first examine qua the landlords as a class, as in this case the

petitioner has several mundkars. In a given case the mundkar might have exercised his right to purchase under Section 15 of the Act soon after the coming into force of the Principal Act, for example, in 1980. That mundkar will have to bear the same price as on 12th March, 1976, the appointed date. Whereas another mundkar of the same landlord has deferred his option for whatever reasons intentionally or otherwise, to exercise right to purchase and instead would exercise the same after any number of years, for example, 30 years hence. Even that mundkar would be entitled to purchase the property from the bhatkar at the price as on 12th March, 1976. Therefore, the landlord as a class, would receive the "same amount" for extinction of his right in the estate even if it has occurred at different points of time. Taking the converse situation, namely, mundkar as a class, even there the effect of this Amendment Act is that equals get unequal benefit or advantage. Applying the above illustration, mundkar paying price of land in 1980 and another mundkar paying the "same amount", but as per his convenience, deliberately or otherwise, in the latter case also, "same amount" is being paid by the mundkar, say after 30 years from now or for that matter, from 1976. The rupee value of which would obviously be much different in terms of index price in relative terms, though. As is already mentioned above, the Act makes no provision for requiring the mundkar to purchase the land much less within specified time, nor does it provide for any consequence of not exercising the right to purchase

in a reasonable time. This, obviously, amounts to freezing or pegging down of the market price and area; And the consequences are so absurd, that the conclusion that the Amendment Acts are unjust laws is inevitable. It is a well established principle that unjust laws are not laws (lex injusta non est lex). Indeed, differential treatment arising out of the application of the laws may not immediately attract the clause of the Constitution prohibiting discrimination, but by the passage of time, considerations of necessity and expediency would be obliterated and the grounds which justified classification may cease to be valid. We are conscious that the present enactment is an attempt towards social welfare legislation, but that does not mean that equals should get differential treatment either in the matter of rights to enjoy the property, benefits or mundkar as a class, their obligation to pay a price to purchase the property. The effect of the Amendment Acts is to provide permanancy to freezing or pegging down of price and area of the dwelling house. That perpetuates hostile discrimination without a rationale basis to support it. In other words, by passage of time the Act would apply unequally to equals, namely mundkars as a class or for that matter bhatkars as a class for all time to come. This militates against the validity of such enactment which perpetrates hostile discrimination by efflux or passage of time. If the Act were to provide right to mundkars to purchase the dwelling house coupled with obligation to exercise their right to purchase

within some reasonable time to be specified in that behalf, or even if the law was to provide some consequence for failure to exercise right in specified or reasonable time, even then it may have stood the test of scrutiny under Article 14 of the Constitution. In our view, this is not a case of classification or providing for cut off date but one of pegging down of price and area of the property which may or may nor be purchased by the mundkar in posterity. The effect of application of the Amendment Acts in question is so absurd that it results in treating similarly placed persons differently and dissimilarly placed persons equally.

12. Section 15 plainly provides that the mundkar is entitled to purchase the dwelling house occupied by him at a 'market value'. The expression 'market value' employed in the said provision ordinarily means the price the property would command in the open market. The highest price a willing buyer would pay and a willing seller accept, both being fully informed, and the property being exposed for a reasonable period of time. The market value may be different from the price a property can actually be sold for at a given time. True it is that in the scheme of the present enactment it is a forced sale as and when the mundkar exercises his right to purchase. But as the enactment is not intended to provide for acquisition nor extinguishment of right of the bhatkar on the coming into force of the Act but only upon the happening of mundkar exercising the right to purchase, it is

a deferred sale for any number of years. In such a case pegging down the price as on the appointed date i.e. 12th March, 1976, is an absurdity. It is well settled that even in land acquisition cases when it is established before the Court that the attempt of issuance of Section 4 Notification by the State was only to peg down the market value, which would be a colourable exercise of power, the Court would not hesitate to quash such acquisition proceedings. Similarly, even if there were to be agreement between private parties that one will purchase the land of another as and when he decides to do so at any given point of time (i.e. after any number of years), but at the fixed rate, obviously such a contract may not pass the test of being lawful, as it will be against public policy by virtue of Section 23 of the Contract Act. If there is any right, there is a corresponding duty to exercise that right in a reasonable time. Applying the established principles as embodied in the Limitation Act, if a person fails to exercise right to sue that right would get extinguished on lapse of limitation period provided under the Act. In other words, the provision in the Principal Act results in a situation where no time limit is specified to the mundkar to exercise his right to purchase the property and yet by the impugned Amendment Acts the price and area are pegged down to as on 12th March, 1976. That inevitably results in a situation which is unfair, unjust, unreasonable and hostile discrimination, as equals are being treated unequally, as well as unequals, equally. On the above

reasoning, we have no hesitation in taking the view that the impugned Amendment Acts are ultravires Article 14 of the Constitution of India.

13. We shall now deal specifically with the Amendment Act of 1993. By this Act the expression "prevailing on the appointed date", has been inserted in Sub-section (3) of Section 15 of the Principal Act. The consequence of this amendment is that the mundkar is liable to pay the market value in respect of the dwelling house purchased by him at the rate as prevailing on 12th March, 1976, irrespective of the period or distance of time he would exercise his right to purchase from 1976. We have already demonstrated the drastic consequences flowing from the said amendment especially because no time limit has been provided by the statute requiring the mundkar to exercise his statutory right to purchase the dwelling house occupied by him. This will have to be viewed in the context of the scheme of the Principal Act that there is no provision by which the mundkar becomes deemed purchaser in respect of the dwelling house, but the option available to him to purchase enures to him only when he exercises that right to purchase the dwelling house, subject to fulfilment of other conditions. To put it differently, the right of mundkar under Section 15 is impregnated, fructified and crystlised only upon exercising his option to purchase in the manner provided for under Section 15 read with Section 16 of the

Act. Till such time it is an inchoate right. A Fortiori, it is unfathomable that in law, the market value of the property can be allowed to be pegged down to a period anterior to the fructification of such inchoate right, forced sale though. In that sense, mundkars exercising right under Section 15 of the Act at different point of time cannot be equated for determining the market value of the property, as is the purport of the Amendment Act of 1993. As mentioned earlier, as no time limit is specified, in a given case the mundkar or his successor may chose to exercise that right to purchase the dwelling house after any number of years. There is no provision in the Act providing for consequence for failure to exercise the right to purchase the dwelling house even after a lapse of reasonable time, nor there is a provision which would denude the mundkar of that right even after passage of several years as is the scheme of any other cognate legislation, such as in the Goa Agricultural Tenancy Act. Understood thus, the application of the Amendment clearly results not only in absurd, incongruous, unjust, inequitable, arbitrary situation, but also results in hostile discrimination treating equals as unequals and unequals as equals. Such a legislation cannot stand the test of Article 14 of the Constitution of India as it would clearly impinge upon the right enshrined under Article 14 read with Article 13(2) of the Constitution of India.

14. Insofar as the Amendment Act of 1995 is

concerned, it has inserted expression "on the appointed date" in Sub-item (a) as well as Sub-item (b) of Clause 2(i) (i) of the Principal Act. The definition of the "dwelling house" as envisaged by Section 2(i) of the Principal Act is that it means the house in which the mundkar resides with a fixed habitation and includes the land on which the dwelling house is standing and the land around and appurtenant to such dwelling house, subject to a maximum limit of 5 mts., if the land is within the jurisdiction of a Village Panchayat and 2 mts. if it is not within such jurisdiction, from the outer walls of the dwelling house; and 300 sq. mts. of land, including the land on which the dwelling house is standing, provided that where the dwelling house is within the jurisdiction of municipal council, the dwelling house shall include 200 sq. mts. of land, including the land on which the dwelling house is standing. By inserting the expression "on the appointed date" as aforesaid, the consequence is that the purported restriction by the definition of "dwelling house" is freezed as on 12th March, 1976. In other words, it would mean that the position as obtained on 12th March, 1976, will have to be borne in mind while considering the claim of the mundkar in respect of the dwelling house. This Court in the case of **Fatima D'Souza vs. Joint Mamlatdar** (supra) had occasion to examine the matter in the context of the provision as obtained in the Principal Act before the Amendment. While analysing the said provision as it stood, the learned Single Judge of this Court in paragraph 10 had

observed thus:-

> "10. As rightly pointed out by the learned Advocate General, the Act was enacted to provide for better protection to mundkars against eviction from their dwelling houses as well as for granting them the right to purchase their dwelling houses and to make certain provisions connected therewith. Now, the Act defines who is a mundkar and what is a dwelling house under the Act. Therefore, as the Act intended, inter alia to protect the mundkar against the eviction from his dwelling house and to give him the right to purchase it, it necessarily follows that the right accrued to the mundkar is also in respect of the dwelling house in which he was residing at the point of time of the enforcement of the Act, or at the point of time of the coming into force of the same Act. But, if this position of law appears to be clear and unquestionable, one has to bear in mind, at the same time, the provision of Section 15 of the Act. An examination of the said provision of law leaves no margin for doubts, and as rightly pointed out by the learned Advocate General, what the Section provided for is a right to the mundkar to purchase his dwelling house, if he so wishes. Nowhere, in that particular provision of the Act, or any where else in the Act, it has been laid down that the mundkar is bound to purchase his dwelling house. The provision is, therefore, merely an enabling provision and the mundkar may or may not, according to his wishes, purchase the house. If this is so, it is manifest that if the land around the house and appurtenant to it is freezed from the time of the enforcement of the Act, although that area varies in accordance to it belonging to a Panchayat or Municipal area, an absurd and most unjust situation would arise. In fact, the mundkar may choose not to purchase the land for many many years and to decide to do it only after the lapse of 10, 15 or 20 years. By this time, the conditions which were obtaining at the relevant time of the coming into force of the Act might have, and will definitely have changed. It was precisely having, inter alia in mind this kind of consideration that the Legislature established the land available to the mundkar for purchase in consideration of the circumstances whether his dwelling house

> is within the jurisdiction of a Panchayat or of a Municipal Council. In the light of the above, in my view, the relevant date of fixing the area to which the mundkar will be entitled to purchase as being part of his dwelling house, is the date on which he records his intention to purchase his dwelling house in an application filed to the competent authority to fix the price of the land where the house stands."

We have no hesitation in adopting the reasoning recorded by the learned Single Judge of this Court as referred to above, in addition to what we have already observed in the preceding paragraphs, to hold that the provision would lead to an absurd and unjust situation. The learned Single Judge took the view, and in our opinion rightly, that the provision can be construed to mean that the relevant date of fixing the area to which the mundkar will be entitled to purchase as being part of his dwelling house, is the date on which he records his intention to purchase his dwelling house in an application filed to the competent authority to fix the price of the land where the house stands. This reason was an attempt to save the provision in the Principal Act as it stood then from being unconstitutional by reading it down. Interestingly, although this judgment was rendered by our High Court in 1989, the relevant provision of Section 2(i) (i) has been amended by the Amendment Act of 1995, making no reference to this judgment. Nothing is placed on record before us to even remotely suggest that the Amendment Act of 1995 was brought about to undo this judgment. Indeed the Legislature is competent to undo the efficacy of any judgment of the Court,

but in such a case, it cannot proceed to amend the provision in the manner which will inevitably undo the judgment of the Court, in ignorance or disregard of that decision. The Legislature has to take conscious decision that the **raison d'etre** as recorded in the decision of Court would do violence to the existing provisions or that it has different intention than the view already taken by the Court. It is a well-established principle that the Legislature cannot directly override the decision of the Court and pronounce anything done under that statute to have been valid on the date of the Judgment. It is, however, competent for the Legislature to make a fresh law, free from the unconstitutionality and then provide that anything done under the offending law shall be deemed to have been done under the new law and subject to its provisions. No such justification has been pleaded or argued on behalf of the respondents. Be that as it may, we have no hesitation in taking the view that the consequence of amendment to the definition of "dwelling house" is to freeze the area of the property of the bhatkar as on 12th March, 1976. In a given case, as is rightly noticed by the learned Single Judge in the case of **Fatima D'Souza** (supra), the mundkar may exercise right to purchase after several years, by which time the conspectus has undergone drastic change as the dwelling house which was earlier within the jurisdiction of a Panchayat was no longer within such jurisdiction, but in a Municipal Council. In that situation it cannot be said that even then the mundkar

would be entitled to purchase land on the assumption that he is entitled to purchase so much of the land as would be in the case of land falling within the jurisdiction of the Village Panchayat, which is far in excess than the entitlement to purchase land falling not within such jurisdiction. As we have observed earlier, the right of mundkar is impregnated and crystalised only upon exercise of right in terms of Section 15 read with Section 16 of the Act. It is unfathomable that in law, the area of the property to which the mundkar is entitled to purchase can be freezed to a period anterior to fructification of such an inchoate right. As mentioned earlier, mundkars exercising right under Section of the Act at different point of time cannot be equated. In that sense, equals will be treated unequally and unequals equally. Such a situation cannot be countenanced as it cannot stand the test of Article 14 of the Constitution of India. Accordingly, even the Amendment Act of 1995 will have to be struck down as ultravires Article 14 read with Article 13 (2) of the Constitution of India.

15. The immediate question that arises is what is the fall out of striking down the Amendment Acts of 1993 and 1995? In our opinion in the absence of the Amendment Acts, the provision such as Section 2(i) (i) defining "dwelling house" or, for that matter Section 15 providing for right to purchase the dwelling house, will still be available to the mundkar, but the relevant date of fixing the area, or the

price, as the case may be, to which the mundkar will be entitled to purchase the property, is the date on which he records his intention to purchase the dwelling house in an application filed to the competent authority in that behalf. No more and no less.

16. That takes us to the arguments canvassed on behalf of the respondents. We have already extensively dealt with the first objection taken on behalf of the respondents that it is no more open to this Court to examine the question of the validity of the subject Amendment Acts in view of the decision of the Division Bench in the case of **Aggrieved Bhatkars' Association** (supra). We have already held that in **Aggrieved Bhatkars' Association** case (supra) the issue of validity of the Amendment of 1995 was not put in issue at all. Similarly, the validity of the Amendment Act of 1993 was not put in issue and in any case on the touchstone of Article 14 of the Constitution of India. Moreover, that decision does not categorically negative the challenge to the validity of the subject Amendment Acts. The next argument canvassed on behalf of the respondents was that the contention regarding compensation in case of deprivation of property under law made under Article 300 A is concerned, that contention has not been examined by us, but we have tested the validity of the subject Amendment Acts on the touchstone of Article 14 of the Constitution of India. Indeed, Shri Bharne relied on the decision of the Supreme

Court in **State of Maharashtra vs. Basantibai Mohanlal Khetan** (supra). In the first place, the challenge in the said matter was to the provisions of the Maharashtra Housing and Area Development Act, 1976. That Act had received the assent of the President of India. It is in that perspective the Apex Court has examined the matter that the said enactment was protected by the umbrella of Article 31C of the Constitution, for which reason challenge based on Articles 14, 19, and 31 was unavailable. The ratio of that decision will have no application to the fact situation of the present case where the Amendment Acts are neither included in the Ninth Schedule of the Constitution, nor received assent of the President of India. In that sense, the subject Amendment Acts have no protection either of Article 31A, Article 31B or Article 31C of the Constitution. Besides, the challenge in the present case is not that the statutory price specified as compensation to the bhatkar is illusory, but the argument before us is that price cannot be pegged down in the absence of any obligation on the mundkar to purchase the dwelling house within some reasonable time and more so when no consequence for the failure is provided for. In our view, reliance placed by Shri Bharne on the decision of the Apex Court in **Jilubhai Nanbhai Khachar, etc. vs. State of Gujarat** (supra) is also of no avail. Even in that case the Act in question was protected by the provisions of Article 31A of the Constitution of India. Even the Full Bench of the Kerala High Court relied upon by Shri Bharne in the case of

Smt. Elizabeth Samuel Aaron & Ors. vs. State of Kerala & Ors.,(supra) will be of no avail as even in that case the enactment was protected by the provision of Article 31C of the Constitution of India.

17. It will be apposite to advert to the dictum of the Apex Court in the case of **Jilubhai Nanbhai Khachar** (supra) particularly paragraphs 32 and 48. In paragraph 32, the Apex Court has observed that taking possession or acquisition should be in the connotation of the acquisition or requisition of the property for public purpose. It is further observed that deprivation is specifically referable to acquisition or requisition and not for any and every kind of deprivation. As is the scheme of the present enactment, there is no deprivation of the property of the bhatkar, but it only restricts the right of the bhatkar qua the property as prescribed by the Act. There is neither deprivation of the property by acquisition or requisition, nor the property is taken possession for a public purpose. All that the Act provides is to kindle a right in favour of the mundkar to enable him to purchase the property. No more and no less. It is only when the mundkar was to exercise that right that the right of the bhatkar qua that property would be extinguished and not otherwise. The bhatkar otherwise would be entitled to deal with that property provided however, subject to the restriction envisaged in Section 9 of the Principal Act. In that sense, the present enactment is a sui

generis legislation.

18. The next argument that the payment of compensation in the context of object of extinguished rights is quite reasonable as is advanced on behalf of the respondents, also does not commend to us. That is not the basis on which we have examined the matter, but the consequence flowing from application of the same enactments to same class of persons differently or differently placed persons equally, is the basis to hold that the provision is hit by Article 14 of the Constitution of India. Reliance was also placed on the decision of the Apex Court in the case of **D. C. Bhati & Ors. vs. Union of India & Anr.** (supra). That decision has no application to the issue that arises for our consideration. In that case the question was one of application of the Act in the context of exemption of specified class of persons provided in the Act. The Apex Court considered the arguments only in that context to hold that it is open to the Legislature to identify the section of people who need the protection and decide how the classification needs to be done and what should be the cut off point for the purpose of making such classification. In the present case however, the provision is not one of classification, but of pegging down of price as well as area. Besides, we have already indicated reasons as to how the consequence of application of the same provision to same class of persons would yield different results and different

class of persons equally, which cannot stand the test of Article 14 of the Constitution of India.

15. For the aforesaid reasons, we hold that the Amendment Acts of 1993 and 1995 respectively are ultravires Article 14 read with Article 13 (2) of the Constitution of India. In the circumstances, this petition succeeds. Rule made absolute, with no order as to costs.

16th December, 2003.

16. At this stage, Shri Bharne, learned Government Advocate appearing for the respondents prays that the operation of this Judgment be stayed for a period of twelve weeks from today. We deem it appropriate to accede to that request. Stay of operation of our Judgment pronounced today for a period of twelve weeks as prayed for is granted.

A. M. KHANWILKAR, J.

P. V. HARDAS, J.

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